

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JUAN CARLOS APOLINAR,

Defendant.

No. CR 17-40106-03-KES

**FINAL
INSTRUCTIONS
TO THE JURY**

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VERDICT FORM

FINAL INSTRUCTION NO. 1 – INTRODUCTION

Members of the jury, the written instructions I gave you at the beginning of the trial and the oral instructions I gave you during the trial remain in effect. I now give you some additional instructions.

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. *All* instructions, whenever given and whether in writing or not, must be followed. This is true even though some of the instructions I gave you at the beginning of the trial are not repeated here.

FINAL INSTRUCTION NO. 2 – CONSPIRACY TO DISTRIBUTE
METHAMPHETAMINE

For you to find Juan Carlos Apolinar guilty of the “conspiracy” offense charged in Count 1 of the Second Superseding Indictment, the prosecution must prove the following essential elements beyond a reasonable doubt:

One, beginning on an unknown date and continuing until on or about November 15, 2017, two or more persons reached an agreement or came to an understanding to distribute methamphetamine;

A conspiracy is an agreement of two or more persons to commit one or more crimes. It makes no difference whether any co-conspirators are defendants or named in the Second Superseding Indictment. For this element to be proved,

- Apolinar may have been, but did not have to be, one of the original conspirators
- The crime that the conspirators agreed to commit did not actually have to be committed
- The agreement did not have to be written or formal
- The agreement did not have to involve every detail of the conspiracy
- The conspirators did not have to personally benefit from the conspiracy

Here, the conspirators allegedly agreed to commit the crime of distribution of methamphetamine. The elements of distribution of methamphetamine are the following:

- *One*, that a person intentionally transferred methamphetamine to another;
- *And two*, that at the time of the transfer, the person knew that what he was transferring was a controlled substance.

Remember that the prosecution does not have to prove that distribution of methamphetamine actually occurred for this element of the “conspiracy” offense to be proved.

Two, that the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect;

Apolinar must have joined in the agreement, but he may have done so at any time during its existence. Apolinar may have joined the agreement even if he agreed to play only a minor role in it.

Apolinar did not have to do any of the following to join the agreement:

- join the agreement at the same time as all the other conspirators
- know all of the details of the conspiracy, such as the names, identities, or locations of all the other members, or
- conspire with every other member of the conspiracy

On the other hand, each of the following, alone, is not enough to show that Apolinar joined the agreement:

- evidence that a person was merely present at the scene of an event
- evidence that a person merely acted in the same way as others
- evidence that a person merely associated with others
- evidence that a person was friends with or met socially with individuals involved in the conspiracy
- evidence that a person who had no knowledge of a conspiracy happened to act in a way that advanced an objective of the conspiracy
- evidence that a person merely knew of the existence of a conspiracy

- evidence that a person merely knew that an objective of the conspiracy was being considered or attempted, or
- evidence that a person merely approved of the objectives of the conspiracy

Rather, the prosecution must prove that Apolinar had some degree of knowing involvement in the agreement.

In deciding whether an alleged conspiracy existed, you may consider the acts and statements of each person alleged to be part of the agreement. In deciding whether Apolinar joined the agreement, you may consider only the acts and statements of Apolinar.

And three, that at the time the defendant joined in the agreement or understanding, he knew the purpose of the agreement or understanding.

A person knows the purpose of the agreement if he is aware of the agreement and does not participate in it through ignorance, mistake, carelessness, negligence, or accident. It is seldom, if ever, possible to determine directly what was in the defendant's mind. Thus the defendant's knowledge of the agreement and its purpose can be proved like anything else, from reasonable conclusions drawn from the evidence.

It is not enough that the defendant and other alleged participants in the agreement to commit the crime of distribution of methamphetamine simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. The defendant must have known of the existence and purpose of the agreement. Without such knowledge, the defendant cannot be guilty of conspiracy, even if his acts furthered the conspiracy.

For you to find Apolinar guilty, the prosecution must prove all of the essential elements of this offense beyond a reasonable doubt. Otherwise, you

must find Apolinar not guilty of the offense charged in Count 1 of the Second Superseding Indictment.

Quantity of Methamphetamine

If you find Apolinar guilty of the “conspiracy” offense alleged in Count 1 of the Second Superseding Indictment, you must also determine beyond a reasonable doubt the quantity of methamphetamine involved in the conspiracy for which Apolinar can be held responsible. The prosecution does not have to prove that the offense involved the amount or quantity of methamphetamine charged in the Second Superseding Indictment, although the prosecution must prove beyond a reasonable doubt the quantity of methamphetamine actually involved in the offense for which the defendant can be held responsible. Therefore, you must ascertain whether or not the controlled substance in question was in fact methamphetamine, as charged in the Second Superseding Indictment, and you must determine beyond a reasonable doubt the amount of methamphetamine involved in the offense for which the defendant can be held responsible. In so doing, you may consider all of the evidence in the case that may aid in the determination of these issues.

A defendant guilty of conspiracy to distribute methamphetamine, as charged in the Second Superseding Indictment, is responsible for quantities of methamphetamine that he actually distributed or agreed to distribute. Such a defendant is also responsible for those quantities of methamphetamine that fellow conspirators distributed or agreed to distribute, if you find that the defendant could have reasonably foreseen, at the time he joined the conspiracy or while the conspiracy lasted, that those prohibited acts were a necessary or natural consequence of the conspiracy.

You must determine the *total quantity* of the controlled substance involved in the conspiracy for which the defendant can be held responsible. You must indicate the *range* within which that *total quantity* falls. You must

determine that *total quantity* in terms of grams of methamphetamine (actual). In making your determination of quantity as required, it may be helpful to remember that one pound is equal to 453.6 grams and that one ounce is equal to 28.35 grams.

Again, you must determine *beyond a reasonable doubt* the quantity of methamphetamine involved in the conspiracy for which the defendant can be held responsible.

FINAL INSTRUCTION NO. 3 – CO-CONSPIRATOR ACTS AND STATEMENTS

If you determined that an agreement existed and Apolinar joined the agreement, then acts and statements knowingly done or made by a member of the agreement during the existence of the agreement and in furtherance of it, may be considered by you as evidence pertaining to Apolinar, even though the acts and statements were done or made in the absence of and without the knowledge of Apolinar. This includes acts done or statements made before Apolinar joined the agreement, because a person who knowingly, voluntarily and intentionally joins an existing conspiracy becomes responsible for all of the conduct of the co-conspirators from the beginning of the conspiracy.

Acts and statements which are made before the conspiracy began or after it ended are admissible only against the person making them and should not be considered by you against any other defendant.

FINAL INSTRUCTION NO. 4 – FALSE STATEMENT IN CONNECTION WITH
THE PURCHASE OF A FIREARM

For you to find Juan Carlos Apolinar guilty of the “making a false statement in connection with the purchase of a firearm” offense charged in Count 2 of the Second Superseding Indictment, the prosecution must prove the following essential elements beyond a reasonable doubt:

One, that on or about October 15, 2017, Apolinar acquired or attempted to acquire a firearm from a federally licensed firearms dealer;

The term “firearm” means any weapon which is designed to, or may readily be converted to, expel a projectile by the action of an explosive. The term includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer.

Two, that Apolinar knowingly made a false or fictitious statement, in writing, that was likely to deceive the dealer;

A statement is “false or fictitious” if it is untrue when made and the person making it knows it is untrue.

A false statement is “likely to deceive” if, under the circumstances, a reasonable person of ordinary prudence would probably be deceived.

And three, that the subject matter of the false statement was material to the lawfulness of the sale.

If you find that the statement in this case is false, then it was “material” to the sale.

For you to find Apolinar guilty, the prosecution must prove all of the essential elements of this offense beyond a reasonable doubt. Otherwise, you must find Apolinar not guilty of the offense charged in Count 2 of the Second Superseding Indictment.

FINAL INSTRUCTION NO. 5 – IMPEACHMENT

In Preliminary Instruction No. 6, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness’s present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

You have heard evidence that David Johnson has pleaded guilty to a crime that arose out of the same events for which this defendant is now on trial. You cannot consider such a witness’s guilty plea as any evidence of the guilt of this defendant. Rather, you can consider such a witness’s guilty plea only for the purpose of determining how much, if at all, to rely upon his testimony.

You have heard evidence that Trish Moravetz has made a plea agreement with the government or has received a promise from the government that her testimony will not be used against her in a criminal case. Her testimony was received in evidence and may be considered by you. You may give her testimony such weight as you think it deserves. Whether or not her testimony may have been influenced by the plea agreement or government’s promise is for you to determine.

The witness's guilty plea cannot be considered by you as any evidence of this defendant's guilt. The witness's guilty plea can be considered by you only for the purpose of determining how much, if at all, to rely upon the witness's testimony.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness's testimony whatever weight you think it deserves.

Your decision on the facts of this case should not be determined by the number of witnesses testifying for or against a party. You should consider all the facts and circumstances in evidence to determine which of the witnesses you choose to believe or not believe. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

FINAL INSTRUCTION NO. 6 – PRESUMPTION OF INNOCENCE AND BURDEN
OF PROOF

The presumption of innocence means that the defendant is presumed to be absolutely not guilty.

- This presumption means that you must put aside all suspicion that might arise from the defendant's arrest, the charges, or the fact that he is here in court.
- This presumption remains with the defendant throughout the trial.
- This presumption is enough, alone, for you to find the defendant not guilty, unless the prosecution proves, beyond a reasonable doubt, all of the elements of the offenses charged against him.

The burden is always on the prosecution to prove guilt beyond a reasonable doubt.

- This burden never, ever shifts to the defendant to prove his innocence.
- This burden means that the defendant does not have to call any witnesses, produce any evidence, cross-examine the prosecution's witnesses, or testify.

This burden means that you must find the defendant not guilty of an offense charged against him, unless the prosecution proves beyond a reasonable doubt that he has committed each and every element of that offense.

FINAL INSTRUCTION NO. 7 – REASONABLE DOUBT

A reasonable doubt is a doubt based upon reason and common sense.

- A reasonable doubt may arise from evidence produced by the prosecution or the defendant, keeping in mind that the defendant never, ever has the burden or duty to call any witnesses or to produce any evidence.
- A reasonable doubt may arise from the prosecution's lack of evidence.

The prosecution must prove the defendant's guilt beyond a reasonable doubt.

- Proof beyond a reasonable doubt requires careful and impartial consideration of all the evidence in the case before making a decision.
- Proof beyond a reasonable doubt is proof so convincing that you would be willing to rely and act on it in the most important of your own affairs.

The prosecution's burden is heavy, but it does not require proof beyond all possible doubt.

FINAL INSTRUCTION NO. 8 – DUTY TO DELIBERATE

A verdict must represent the careful and impartial judgment of each of you. Before you make that judgment, you must consult with one another and try to reach agreement if you can do so consistent with your individual judgment.

- If you are convinced that the prosecution has not proved beyond a reasonable doubt that the defendant is guilty, say so.
- If you are convinced that the prosecution has proved beyond a reasonable doubt that the defendant is guilty, say so.
- Do not give up your honest beliefs just because others think differently or because you simply want to be finished with the case.
- On the other hand, do not hesitate to re-examine your own views and to change your opinion if you are convinced that it is wrong.
- You can only reach a unanimous verdict if you discuss your views openly and frankly, with proper regard for the opinions of others, and with a willingness to re-examine your own views.
- Remember that you are not advocates, but judges of the facts, so your sole interest is to seek the truth from the evidence.
- The question is never who wins or loses the case, because society always wins, whatever your verdict, when you return a just verdict based solely on the evidence, reason, your common sense, and these Instructions.
- You must consider all of the evidence bearing on each

element before you.

- Take all the time that you feel is necessary.

Remember that this case is important to the parties and to the fair administration of justice, so do not be in a hurry to reach a verdict just to be finished with the case.

FINAL INSTRUCTION NO. 9 – DUTY DURING DELIBERATIONS

You must follow certain rules while conducting your deliberations and returning your verdict:

- Select a foreperson to preside over your discussions and to speak for you here in court.
- Do not consider punishment in any way in deciding whether the defendant is not guilty or guilty. If the defendant is guilty, I will decide what his sentence should be.
- Communicate with me by sending me a note through a Court Security Officer (CSO). The note must be signed by one or more of you. Remember that you should not tell anyone, including me, how your votes stand. I will respond as soon as possible, either in writing or orally in open court.
- Base your verdict solely on the evidence, reason, your common sense, and these Instructions. Again, nothing I have said or done was intended to suggest what your verdict should be—that is entirely for you to decide.
- Reach your verdict without discrimination. In reaching your verdict, you must not consider the defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex.
- Complete the Verdict Form. The foreperson must bring the signed verdict form to the courtroom when it is time to announce your verdict.
- When you have reached a verdict, the foreperson will advise

the CSO that you are ready to return to the courtroom.

Good luck with your deliberations.

Dated December 18, 2018.

BY THE COURT:



KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE